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No. 05-88

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents' corporate disclosure statement was set forth at page *ii* of their Brief in Opposition, and there are no amendments to that statement.

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INTRODUCTION

Respondents hereby file this Supplemental Brief in response to the Brief of *Amici Curiae* ("Amicus Brief") the Impact Fund, Asian Law Caucus, Inc., Asian Pacific American Legal Center, Employment Law Center, Equal Rights Advocates, and Public Advocates ("*Amici*"). *Amici* fail to present any "compelling reasons" for this Court to grant Petitioners' Petition for a Writ of *Certiorari* ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners make no effort to demonstrate that the Eleventh Circuit's November 10, 2004 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Instead, *Amici* merely attempt to establish that the District Court *should have* certified a class.[1] Such a showing — which, in any event, *Amici* have not made — falls far short of demonstrating that there are compelling reasons for the Petition to be granted or even that the District Court's denial of certification constitutes an abuse of discretion.[2] Accordingly, *Amici* have provided no "relevant matter not already brought to [this Court's] attention by the parties," and the Petition should be denied. *See* Sup. Ct. R. 37.1.

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1. Tellingly, *Amici* do not appear in support of Petitioners' contentions that (i) the lower courts' analysis of Petitioners' expert report violates *Bazemore v. Friday*, 478 U.S. 385 (1986) or that (ii) this Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003) affects the outcome of this case.

2. The denial of class certification is reviewed under the highly deferential abuse-of-discretion standard. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Expressly Prohibits District Courts from Deciding the Merits of a Case at the Certification Stage

A. *Amici* Have Not Attempted to Demonstrate Any Compelling Reasons for this Court to Review the Lower Courts' Rigorous Analysis of Petitioners' Evidence[3]

At the outset of *Amici*'s argument, *Amici* broadly contend that "[c]*ertiorari* should be granted to clarify the standard for satisfaction of Rule 23 in Title VII class actions." (Amicus Brief at 9). Aside from this generalized, unsupported assertion, however, *Amici* make absolutely no effort to show that there is any need for clarification of the legal standards underlying Rule 23. (*See* Amicus Brief at 9-13). To the contrary, *Amici* themselves contend that the applicable Rule 23 standards are contained in the "*clear holding* of" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). (*See* Amicus Brief at 13) (emphasis added). Likewise, Petitioners — who claim that the decisions below "flatly contradict[ ]" Rule 23 and *Eisen* — do not contend that the caselaw interpreting Rule 23 is unclear in any way. (Pet. App. at 7). In fact, the parties agree that *Eisen* prohibits district courts from deciding the

3. *Amici* devote a substantial portion of their Brief to a discussion about the benefits of class actions generally. (*See* Amicus Brief at 4-9). While Respondents do not dispute that the class action device is an important mechanism to vindicating civil rights, the availability of attorney's fees as well as compensatory and punitive damages under the Civil Rights Act of 1991 undermines *Amici*'s contention that "[w]ithout the benefit of class actions, the alternative will likely be no lawsuit at all." (*See* Pet. App. at 5); *see Zapata v. IBP, Inc.*, 167 F.R.D. 147, 163 (D. Kan. 1996) (rejecting plaintiffs' argument in putative class action that individual plaintiffs are unlikely to bring employment discrimination suits, because "Title VII provides for the allowance of attorneys' fees, which is strong incentive for attorneys to bring suit on behalf of individual plaintiffs").

merits of a case at the certification stage. Thus, it is readily apparent that the federal courts do not need clarification of the Rule 23 criteria.

In actuality, *Amici* are essentially attempting to challenge the *correctness* of the decisions below under the particular facts of this case. Specifically, *Amici* present the same argument advanced by Petitioners — *i.e.*, that the District Court violated this Court's decision in *Eisen* by deciding the merits of Petitioners' discrimination claims at the certification stage. (Amicus Brief at 11-13). This misguided strategy fails for the simple reason that such a showing (which, as discussed below, *Amici* have *not* made) would fall far short of satisfying this Court's heightened threshold for granting *certiorari*. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Instead, *Amici* have the burden of demonstrating that the decisions below (i) conflict with a decision of this Court or a Court of Appeals or (ii) implicate federal question that has not been decided by this Court. *See* Sup. Ct. R. 10(a)-(c). Even a cursory review of *Amici*'s Amicus Brief demonstrates that *Amici* have not even attempted to make either of these showings. Therefore, *Amici*'s Amicus Brief is of no assistance to this Court, and the Petition should be denied.

B. The Lower Courts' Rigorous Analysis of Petitioners' Evidence Is Mandated by this Court's Jurisprudence

In *Eisen*, this Court held that the district court erred by holding a preliminary hearing on the merits of the plaintiff's claims at the class certification stage, because "[n]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. *Amici* contend

that, "[c]ontrary to this Court's *Eisen* rule, the Eleventh Circuit's decision endorsed an analysis by the district court, which required the plaintiffs to prove liability in order to satisfy Rule 23."[4] (Amicus Brief at 11). *Amici*'s contention, however, ignores the Eleventh Circuit's directive in *this* case that "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. 22a) (emphasis added). Clearly, the Eleventh Circuit does not endorse (and in fact it explicitly prohibits) merits inquiries at the certification stage.

Amici further claim that District Court erred when it "delved deeply into an analysis of the evidence." (Amicus Brief at 12). This assertion is belied by this Court's jurisprudence since *Eisen* was decided. Specifically, this Court has subsequently explained that district courts are *required* to conduct a "rigorous analysis" of the evidence to determine whether the plaintiffs have satisfied the elements of Rule 23(a). *See General Telephone Company of the Southwest v. Falcon* 457 U.S. 147, 161 (1982) ("a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"). In this case, the District Court properly conducted a rigorous analysis of Petitioners' evidence for the sole purpose of determining whether Petitioners established commonality and typicality under Rule 23(a). (*See, e.g.*, Pet. App. at 327a ("it is important to focus on the relative strength and quality of [Petitioners'] evidence to determine if it is strong enough to provide the element of commonality needed for class certification"); Pet App. at 323a ("[p]laintiffs have made little effort to show what facts prove [typicality")). As the Eleventh Circuit recognized in light of *Falcon*, the "District Court would have erred if it had certified a class without first

4. The Eleventh Circuit expressly rejected the notion that the District Court decided the merits of Petitioners' claims. (Pet. App. at 22a-23a).

determining that the named plaintiffs had claims common to those of the unnamed class members." (Pet. App. at 23a).

Amici's additional contention that the courts below "relied" on the liability standard for pattern and practice claims is misleading. (*See* Amicus Brief at 11-12). In reality, the Courts merely recited this liability standard because they were compelled by Rule 23(a) to analyze whether Petitioners had claims in *common* with the putative class under Petitioners' pattern and practice theory. (*See* Pet. App. at 29a

> *Commonality* in the claims of the broad class the plaintiffs sought to certify would have to be established by showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy.

Pet. App. at 37a ("we conclude that the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not establish pattern and practice discrimination *common* to the class or a *common* disparate impact affecting the defendants' African-American employees class-wide")) (emphasis added).

While some of this evidence naturally was intertwined with the evidence Petitioners would have used to prove the merits of their case, it was not an abuse of discretion for the lower courts to conduct a rigorous analysis of Petitioners' evidence. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("evaluation of many of the questions entering into determination of class action questions is *intimately involved with the merits of the claims*") (emphasis added). Indeed, this Court requires district courts to conduct the very analysis that was conducted by the lower courts in

this case. (*See* Pet. App. at 23a ("the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class"); *see Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("*Eisen*'s prohibition against assessing plaintiffs' likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits"). Accordingly, this issue plainly does not warrant this Court's attention.

II. *Amici* Make No Effort to Demonstrate "Compelling Reasons" for Reviewing the Denial of Certification of an Equitable Relief-Only Class

As a threshold matter, *Amici* do not even attempt to show that the Eleventh Circuit's Opinion affirming the denial of certification of an equitable relief-only class conflicts with a decision of this Court or a Court of Appeals or implicates a federal question that has not been decided by this Court. (*See* Amicus Brief at 13-17); Sup. Ct. R. 10(a)-(c). In fact, *Amici* do not even claim that the District Court abused its discretion in declining to certify an equitable relief-only class. (*See* Amicus Brief at 13-17). Instead, *Amici* primarily attempt to identify supposed flaws in the lower courts' analysis, and *Amici* hypothesize about other possible alternatives that were supposedly available to the District Court. (*See id.*). Accordingly, *Amici* have not demonstrated any compelling reasons for this Court to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

A. Petitioners Have Never Identified a Discriminatory Policy or Specified the Injunctive Relief They Claim To Be Seeking

Amici challenge the Eleventh Circuit's decision to affirm the denial of Petitioners' so-called "request" for certification of an equitable relief-only class.[5] (Amicus Brief at 15). Petitioners, however, *never actually dismissed their claims for compensatory and punitive damages*. Therefore, Petitioners' contention merely presents a hypothetical scenario that is not properly before this Court.

Amici, who completely disregard the fact that Petitioners never actually sought an injunctive relief-only class, emphasize that "courts have ordered defendants to change specific employment practices to remedy discrimination." (Amicus Brief at 8 (citing *see, e.g., Bridgeport Guardians, Inc.*, 933 F.2d 1140, 1142, 1149 (2nd Cir. 1991) (affirming injunction which mandated use of "banding" in connection with employment test that had disparate impact on minority candidates); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721, 723-24, 726 (8th Cir. 1973) (defendant ordered to alter discriminatory recruiting practices where certain departments were segregated entirely along racial lines))). Unlike the plaintiffs in the cases cited by *Amici* (who identified specific, discrete employment practices that could be enjoined), Petitioners have never identified any discriminatory policy or specified the injunctive relief they claim to be seeking. (Pet. App. at 370a ("Plaintiffs have given the Court little

5. There is no need for this Court to reach this issue because the District Court did not abuse its discretion in determining that Petitioners failed to satisfy the elements of Rule 23(a). *See* Fed. R. Civ. P. 23(b) (plaintiff must meet all four of the requirements of Rule 23(a) *and* at least one requirement of Rule 23(b)); *Grosz v. The Boeing Co.*, No. 04-55428, 2005 WL 1515070, *2 (9th Cir. June 28, 2005) ("[b]ecause we find that the requirements of Rule 23(a) are not met, we need not reach the question of whether the proposed class satisfies, in addition, one of the requirements of Rule 23(b)).

information as to what sort of injunctive or declaratory relief would be of such clear importance as to warrant a determination that equitable issues predominate over the issues of damages") Pet. App. at 40a n.13 ("the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future")). Indeed, Petitioners claimed at the certification stage that "Defendants' actual policy is 'no policy.'" (Pet. App. at 349a). For these reasons, as well as Petitioners' failure to satisfy the elements of Rule 23(a), the District Court did not abuse its discretion in declining to certify an equitable relief-only class.

B. This Case is Readily Distinguishable from *Allen*

Petitioners rely heavily on a recent Seventh Circuit decision in which that Court ordered certification of an equitable relief-only class. (Amicus Brief at 14-15 (citing *Allen v. Int'l Truck and Engine*, 358 F.3d 469 (7th Cir. 2004)). In *Allen*, the district court held that twenty-seven named plaintiffs — who sought to represent a class of 323 African-American employees working for a single company at a single plant — successfully established the elements of Rule 23(a). 358 F.3d at 471. Nevertheless, the district court declined to certify an equitable relief-only class on the ground that such a class would "result in confusion and be overly burdensome to the resources of the court system." *Id.*. The Seventh Circuit reversed and remanded for a jury trial, holding that a class proceeding for equitable relief would be "no more complex than [twenty-seven] individual trials."[6] *Id.* at 472.

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6. Although the Seventh Circuit also determined that certification of an equitable relief-only class would not have violated the Seventh Amendment, *Amici* have made no effort to demonstrate that the District Court's consideration of concerns about Seventh Amendment issues (which were based on the unique facts of this case) constitute an abuse of discretion. (*See* Amicus Brief 13-17); *Allen*, 358 F.3d at 472.

The facts of this case are readily distinguishable from the facts in *Allen*. As an initial matter, while the named plaintiffs in *Allen* satisfied all four elements of Rule 23(a), Petitioners established only *one* of those four elements in this case (numerosity). *Id.* at 471; (Pet. App. at 324a-326a, 366a-367a). Further, the named plaintiffs in *Allen* sought to represent a class of 323 employees. In contrast, Petitioners purport to represent a class of *2,400* employees — more than seven times the number of class members than in *Allen*. (Pet. App. at 3a, 28a). In addition, whereas all of the employees in *Allen* worked for a single company at a single plant, the employees in the putative class in this case work for three different companies at more than 200 different locations in several states.[7] (R136 V.3 Tab 27: 9-28). Because of these significant factual differences, the Eleventh Circuit's Opinion can be read in harmony with the Seventh Circuit's decision in *Allen*, which has no bearing on the Petition whatsoever.

C. The Eleventh Circuit Does Not Employ a "Damned if You Do, Damned if You Don't" Rule

Finally, *Amici* contend that the Eleventh Circuit employs a "damned if you do, damned if you don't" rule that gives "victims of discrimination little choice but to forfeit the class treatment that may be their only realistic hope for enforcing their civil rights . . ." (Amicus Brief at 15). *Amici*, however, ignore the fact that Rule 23(b)(2) is not the only avenue for plaintiffs to pursue allegations of class-wide discrimination. In this case, Petitioners also sought unsuccessfully certification under Rule 23(b)(3) — yet neither Petitioners nor *Amici* contend that the District Court's denial of

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7. Based on these facts, it was certainly within the District Court's considerable discretion to determine that "the prospect of trying possibly two thousand of these claims before a single jury is simply absurd." (Pet. App. at 372a).

certification under Rule 23(b)(3) was an abuse of discretion.[8] (*See* Pet. App. at 22-24, 372a; Amicus Brief at 13-17). Thus, this contention is unavailing.

CONCLUSION

Amici (like Petitioners) have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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8. *Amici* also claim that "numerous circuits authorize the provision of notice and an opt-out rights in (b)(2) cases so that class members may pursue compensatory damages individually, if they wish to." This contention is immaterial because Petitioners have not claimed that the District Court abused its discretion by not certifying a class under Rule 23(b)(2) with opt-out rights. (*See* Pet. App. 1-30).